

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES J. DAVIS,

Plaintiff,

ORDER

v.

14-cv-108-wmc

MICHAEL MEISNER, *et al.*,

Defendants.

State inmate James J. Davis filed a proposed civil action for damages pursuant to 42 U.S.C. § 1983, alleging that he was convicted of false disciplinary charges in violation of his right to due process. Davis has requested leave to proceed *in forma pauperis* and he has paid an initial partial filing fee in the amount of \$38.00 in compliance with 28 U.S.C. § 1915(b)(1). Davis has now filed a motion to withdraw his complaint and he asks for the return of his initial partial fee payment.

The court construes Davis's motion as a request for voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A), which allows dismissal upon the plaintiff's request before the opposing party serves either an answer or a motion for summary judgment. Because no responsive pleading has been requested or received in this case, the motion will be granted and the case will be dismissed without prejudice to re-filing. *See Smith v. Potter*, 513 F.3d 781, 782-83 (7th Cir. 2008) (observing that a plaintiff's motion for voluntary dismissal filed before the opposing party serves either an answer or dispositive motion automatically effects dismissal of the case); *see also Nelson v. Napolitano*, 657 F.3d 586,

587-88 (7th Cir. 2011) (discussing the effect of a voluntary dismissal under Rule 41(a)) (collecting cases).

As for Davis's request for a refund, the court is unable to return his initial partial filing fee of \$38.00. In that respect, the federal *in forma pauperis* statute does not permit a court to waive a prisoner's obligation to pay all or at least some of the filing fee. Accordingly, while the court can excuse plaintiff from making any further payments as the result of his request for voluntary dismissal, the court cannot authorize a refund of the amount it has already received. Thus, the court will vacate only that portion of the order entered on February 14, 2014, conferring indigent status and assessing an initial partial filing fee of \$38.00, which requires him to make additional installments on the remainder of the \$350 filing fee for this case.

ORDER

IT IS ORDERED that:

1. The motion for voluntary dismissal filed by plaintiff James J. Davis (Dkt. # 10) is GRANTED.
2. The order entered on February 14, 2014 (Dkt. # 5), is VACATED, in part, regarding plaintiff's obligation to pay by installment the remaining portion of the \$350 filing fee in this case.

3. The complaint is DISMISSED without prejudice pursuant to Fed. R. Civ.

P. 41(a). The clerk's office shall terminate all pending motions and close this case.

Entered this 19th day of June, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge